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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-109

DEBRA MILLENSON, on behalf of herself and all others similarly situated,

Petitioner,

—v.—

THE NEW HOTEL MONTELEONE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No. .....

DEBRA MILLENSON, on behalf of herself and all others similarly situated,

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THE NEW HOTEL MONTELEONE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Debra Millenson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 23, 1973, rehearing denied, May 9, 1973.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit has not yet been reported; it is set out in the Appendix, *infra,* at pp. 15-18. The District Court for the Eastern District of Louisiana did not issue a written opinion; the portion of the transcript embodying its conclusions is set out in the Appendix, *infra,* at pp. 21-23.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 23, 1973. A timely filed petition for rehearing was denied May 9, 1973. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

Question Presented

Whether a liquor license granted by the state to a place of public accommodation that invites patronage by all adult members of the male sex, but refuses to serve and excludes as customers all members of the female sex, constitutes "state action" proscribed by the Fourteenth Amendment to the United States Constitution.

Statement of the Case

Petitioner, Debra Millenson, is an attorney licensed to practice law in the State of Louisiana. On May 18, 1972, Ms. Millenson and several companions, men and women, sought service at the Men's Grill of the New Hotel Monteleone, New Orleans, Louisiana.* Although there were vacant tables and other parties without reservations were seated, Millenson and her party were denied service because of the presence of women in her party.

Motivation for the Grill's exclusion of women is explained to the public in a Hotel advertisement which reads:

---

* This statement incorporates verbatim the facts as reported in the opinion of the Court of Appeals, *infra* pp. 15-18.

Lunch for the liberated male

> Women. Bless them. They're the most delightful creatures on earth. But there are times when a man prefers the company of other men. To discuss business for instance, politics, sports, or, of course . . . women.

Following her exclusion from the Grill, Ms. Millenson filed this action for declaratory and injunctive relief against the New Hotel Monteleone. Suing on her own behalf and on behalf of all others similarly situated, Ms. Millenson requested 1) a declaration that the "males only" admission policy of the Grill, a liquor-licensed place of public accommodation, implicated the state in unconstitutional action; and 2) an injunction restraining continued operation of the Grill as a liquor-licensed place of public accommodation so long as it limits its customers to members of the male sex. In her complaint, Ms. Millenson alleged that the Grill was licensed pursuant to Louisiana law, that the Hotel collected state sales tax on Grill transactions, and that the Hotel received a rebate on such taxes pursuant to the New Orleans City Code.

On August 23, 1972, in a ruling from the bench immediately following oral argument, the district court denied Ms. Millenson's motion for summary judgment and granted the Hotel's motion to dismiss. Ms. Millenson took a timely appeal from the judgment of the district court dismissing her action. On March 23, 1973, the Court of Appeals for the Fifth Circuit affirmed the district court judgment. In a three-page per curiam opinion, the Court of Appeals 1) identified as the dispositive issue whether the issuance of regulatory licenses to a public accommodation by the state

will suffice to color the admission policies of the former with the authority and involvement of the latter; and 2) concluded that *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), was applicable and decisively called for a negative response.

On April 16, 1973, Ms. Millenson timely applied for rehearing and rehearing en banc. On May 9, 1973, her requests for rehearing and rehearing en banc were denied.

REASONS FOR GRANTING THE WRIT

The dispositive question in this case is whether a liquor-licensed place of public accommodation may, consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude females from its premises while inviting the patronage of all adult members of the male sex. Summary exclusion of women, never of men, from places of public accommodation has been an accepted practice in restaurant and bar establishments across the country. Lower federal courts are divided on the issue whether operating licenses granted to places of public accommodation implicate the state in the discriminatory practices of such establishments so as to render the discrimination inconsonant with the Fourteenth Amendment equal protection mandate.

While in the instant case the courts below discerned no relevant distinction between private clubs and places of public accommodation, other courts have concluded that state involvement in discrimination is apparent when the discriminatory practice is that of a licensed place of public accommodation. Absent this Court's settlement of the issue, federal court scrutiny of sex discrimination in places of public accommodation will be determined by the geo-

graphical location of the establishment in question; constitutional review mandated in some federal districts will be foreclosed in others.

I.

Current Decisions of Federal Courts Regarding State Action Implicated in Granting Liquor Licenses to Places of Public Accommodation Conflict in Rationale and Result.

In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court declared state action implicated where a privately-owned restaurant on premises leased from the state followed a practice of excluding blacks. Advising lower courts of the nature of the inquiry to be pursued, the Court cautioned:

> Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance. 365 U.S. at 722.

Elaborating further, in *United States* v. *Guest*, 383 U.S. 745, the Court observed:

> [T]he involvement of the State need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation. 383 U.S. at 755-56.

In *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), the Court held, in a narrowly circumscribed opinion, that the grant of a liquor license to a private social club did not establish an official nexus sufficient to convert private discrimination into state action. Mr. Justice Rehnquist, in his opinion for the Court, carefully distinguished the situation of the Moose Lodge from that of an establishment of the kind represented by the Men's Grill at the New Hotel Monteleone:

> Moose Lodge is a private club in the ordinary meaning of that term. 407 U.S. at 171.
>
> Far from apparently holding itself out as a place of public accommodation, Moose Lodge quite ostentatiously proclaims the fact that it is not open to the public at large. 407 U.S. at 175.
>
> There is no suggestion in this record that Pennsylvania law, either as written or as applied, discriminates against minority groups . . . in their right to purchase and be served liquor in places of public accommodation. 407 U.S. at 175-76.

The *Moose Lodge* decision is consistent with scholarly analysis that called for appropriate regard for "the valuable right of the person or truly private group to engage in all manner of discrimination . . . ." Williams, The Twilight of State Action, 41 Tex. L. Rev. 347, 381 (1963). The decision is entirely compatible with commentary that sharply distinguishes associational interests in authentically private arrangements from settings in which equal protection claims are paramount, and privacy claims attenuated. See, *e.g.*, Henkin, *Shelley* v. *Kraemer*: Notes for a Revised Opinion, 110 Pa. L. Rev. 473 (1962). As stated by

Professor Black in Foreword, "State Action," Equal Protection and California's Proposition 14, 81 Harv. L. Rev. 69 (1967):

> [I]t seems inconceivable that society could live with an asymmetry . . . which reversed Negroes' conviction as sit-inners, while allowing proprietors to throw them out . . . . 81 Harv. L. Rev. at 95.

While the *Moose Lodge* opinion does not purport to cover places of public accommodation, and indeed expressly excludes them from the scope of the decision, the opinion has left lower courts without specific guidance for cases that fall between *Burton* and *Moose Lodge*. As noted in the Harvard Law Review 1971 Term Supreme Court Review:

> While holding that the particular set of relationships between the state liquor authority and Moose Lodge did not amount to state action, the Court made little contribution to the definition of what level of connection with the state would convert otherwise private conduct into that governed by the fourteenth amendment. 86 Harv. L. Rev. 70, 73 (1972).

The absence of clear guidance has resulted in conflicting decisions on whether state action for Fourteenth Amendment purposes is implicated in licensing places of public accommodation. District courts in New York and Ohio, both before and after *Moose Lodge*, have held that it is. The Court of Appeals for the Fifth Circuit, in the instant case, has held that it is not.

Seidenberg v. *McSorleys' Old Ale House*, 317 F. Supp. 593 (S.D.N.Y. 1970), a pre-*Moose Lodge* decision in a case on all fours with petitioner's, held that a public bar that

refused to serve women acted under color of state law by virtue of its liquor license. Not only was there pervasive state regulation of taverns open to the public, but by continuing "annually to renew defendant's license . . . without making any effort . . . to remedy the discrimination or revoke the license which defendant must have in order to practice it," the state "acted" in the manner proscribed in *Burton*. For the critical factor in *Burton* was state *inaction:*

> By its inaction . . . the State has not only made itself a party to the refusal of the service, but has elected to place its power, property and prestige behind the admitted discrimination. 365 U.S. at 725.

Distinguishing between private clubs and places of public accommodation, the *McSorleys'* opinion observes:

> [D]efendant differs from a private men's club, which does not purport, and is not required, to serve the public.
>
> . . . We deal with property voluntarily serving the public, devoted to a business in which volume of patronage is essential to commercial success. When a state licenses such an enterprise, in an area peculiarly subject to state regulation, pursuant to a statute imposing pervasive controls upon the conduct of the business, under circumstances in which state licensing practices endow the license with a certain franchise value as well, the state's involvement in the operation of defendant's business, and hence by implication in the exclusionary practice under attack, rises to the level of significant state action within the meaning of *Burton* . . . . 317 F. Supp. at 604-605.

In *Bennett* v. *Dyer's Chop House*, 350 F. Supp. 153 (N.D. Ohio 1972), a post-*Moose Lodge* case almost identical to petitioner's,* the court allied itself completely with the *McSorleys'* analysis. The *Dyer's* court found no conflict between its decision and *Moose Lodge*:

> Dyer's is not a club as defined in *Irvis*. Rather it is a corporation for profit, incorporated under the laws of the State of Ohio and open to the public during all of its business hours. This Court finds that *Irvis* is limited to a holding based on its particular facts and the case before this Court is clearly distinguishable on its facts. 350 F. Supp. at 155.

The Court of Appeals for the Fifth Circuit, by contrast, ignored the *Burton* admonition that facts must be sifted and circumstances weighed, disregarded the opinions in *McSorleys'* and *Dyer's*, and leaped without explanation from *Moose Lodge* to the determination that

> A cursory examination of the state licensing statutes manifestly leads one to the conclusion that they are completely unrelated to the admission policies of the licensees.

Apparently, examination of precedent was also cursory, for no state statute related to the admission policy at issue in *Burton*. Significantly, in a decision rendered a few weeks earlier, where the issue was race rather than sex discrimination, the Fifth Circuit noted its awareness that the *Moose Lodge* decision did not purport to reach places of

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* In *Dyer's*, however, the exclusion was not total as it is in the case at bar; women were allowed in except during the period 11:00 a.m. to 1:30 p.m., peak hours for the business lunch trade.

public accommodation. *Gilmore* v. *City of Montgomery,* 473 F.2d 832, 839 (5th Cir. 1973). A comparison of the brief per curiam opinion in the instant case with the opinion in *Gilmore* suggests that the court regarded race discrimination as an issue worthy of serious attention, but did not assign the same importance to blatant sex discrimination. The quick disposition of Ms. Millenson's claim is appropriately characterized as "offhand." The cavalier treatment accorded this case thus far supplies a further illustration for the catalogue of judicial exposition that led two "middle-aged, white male" commentators to conclude that

> the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable. Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675, 676 (1971).

Performance of this kind, it is now plain, is no longer tolerable. See *Frontiero* v. *Richardson,* 41 U.S. Law Week 4609 (1973); *Reed* v. *Reed,* 404 U.S. 71 (1971).

In sum, the guidance of this Court is needed to resolve the glaring conflict between the Fifth Circuit and the District Courts for the Southern District of New York and the Northern District of Ohio, to assure the even-handed administration of federal law without regard to geographical accident, and to enunciate the standards governing state action outside discrete areas of purely private conduct in which associational interests are paramount.

II.

Federal Court Decisions on State Action of Fourteenth Amendment Dimension Both Before and After *Moose Lodge* Conflict in Rationale With the Decision Below in Petitioner's Case.

The conclusion of the Court of Appeals for the Fifth Circuit that the requisite state action was absent because "impetus for the grill's admission policies originated with the hotel and not with the state" misses the essential point of *Burton* and of subsequent cases that have relied upon *Burton* to find state action although the discriminatory policy emanated from a private defendant. See, e.g., *Pitts* v. *Department of Revenue,* 333 F. Supp. 662 (E.D. Wisc. 1971); *McGlotten* v. *Connally,* 338 F. Supp. 448 (D.D.C. 1972); *Falkenstein* v. *Department of Revenue,* 350 F. Supp. 887 (D. Ore. 1972) (tax exemption operated to encourage maintenance of discriminatory policy); *Male* v. *Crossroads Associates,* 469 F.2d 616 (2d Cir. 1972) (privately owned apartment complex with discriminatory rental policy involved state action based on administrative and financial connections with state and federal government); *Lavoie* v. *Bigwood,* 457 F.2d 7 (1st Cir. 1972) (discrimination by privately-owned trailer park entailed state action via exclusive zoning); *McQueen* v. *Drucker,* 438 F.2d 781 (1st Cir. 1971) (private housing on land condemned by and purchased from city); cf. *NLRB* v. *Mansion House Center Mfg. Corp.,* 41 U.S. Law Week 2448 (8th Cir. 1973) (Fifth Amendment prohibits requiring employer to bargain with union that maintains racially discriminatory membership policy).

The Fifth Circuit's per curiam opinion is clearly anomalous when placed in the context of contemporaneous state action decisions. It is at least open to question whether the court would have reached a similar conclusion in such short order had the Men's Grill chosen to discriminate on a basis other than sex. Significantly, the decision purports to be "neutral," thus countenancing the exclusion of any group deemed undesirable by the proprietor of a state licensed place of public accommodation. Absent definitive pronouncement by this Court on the scope of the state action concept in the area between *Burton* and *Moose Lodge,* further conflict among lower courts appears inevitable. Petitioner's case provides an ideal vehicle for clarification by this Court essential not only to resolve the present conflict, but to assure consistent identification and application of the constitutional "state action" standard in the future.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June, 1973

Attorneys for petitioner gratefully acknowledge the assistance provided in the preparation of this petition by Lynn H. Schafran, third year student at Columbia Law School.

Opinion of the United States Court of Appeals for the Fifth Circuit Dated March 23, 1973

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3131

Summary Calendar*

DEBRA MILLENSON, On Behalf of Herself and all Others Similarly Situated,

Plaintiff-Appellant,

versus

THE NEW HOTEL MONTELEONE, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(March 23, 1973)

Before:

GEWIN, COLEMAN and MORGAN,

Circuit Judges.

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* Rule 18, 5th Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, 431 F.2d 409, Part I.

PER CURIAM: On May 18, 1972, Ms. Debra Millenson filed the present action seeking declaratory and injunctive relief against the New Hotel Monteleone (hotel) to enjoin its operation of a restaurant, "The Men's Grill", and declaring its "males only" admission policy unconstitutional.[1] On August 23, 1972, the district court denied Millenson's motion for summary judgment and granted the hotel's motion to dismiss. Millenson appeals from the judgment of the district court. We affirm.

Taking the allegations contained within the complaint as true, the following fact situation is established. On May 18, 1972, Ms. Millenson and several companions, men and women, sought service at the Men's Grill of the Hotel. Although there were vacant tables and other parties without reservations were seated, Millenson and her party were denied service because of the presence of women in her party.[2]

Ms. Millenson contends that the admission policies of the grill are unconstitutional because they violate the equal protection clause of the fourteenth amendment. Of course

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[1] Ms. Millenson based her right to relief on 42 U.S.C. 1983. Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1343(3) and 1343 (4).

[2] The hotel does not deny to women access to all its facilities. The coffee shop, the main dining room, and room service are made available to women on the same basis as men. The food and drink served in various parts of the hotel are all prepared in a centralized kitchen. The motivation for the grill's admission policies is clearly and chauvinistically established by a hotel advertisement which reads:

> Lunch for the liberated male
>
> Women. Bless them. They're the most delightful creatures on earth. But there are times when a man prefers the company of other men. To discuss business for instance, politics, sports, or, of course . . . women.

for such a claim to withstand close judicial scrutiny, it is incumbent on the aggrieved party to prove that the actions complained of were taken under color of state law.[3] To fulfill this assigned task Millenson contends that the various licenses issued to the hotel by Louisiana so intertwine the policies of the hotel with state authority that impermissible state action is present.[4] Accordingly, the dispositive issue in the instant case is whether the issuance of regulatory licenses to a public accommodation by a state will suffice to color the admission policies of the former with the authority and involvement of the latter.

For Millenson to succeed it is necessary for her to show that the state licensing system encourages, mandates, or affirmatively authorizes the admission policies of the grill.[5]

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[3] "... § 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections. As was said in Shelley v. Kraemer, supra, § 1 of 'that Amendment erects no shield against merely private conduct, however discriminatory or wrongful.'" Adickes v. S. H. Kress & Co., 398 U.S. 144, 169 (1970) (citations omitted).

[4] Paragraph six of Millenson's complaint alleged:

"The Men's Grill has a liquor license as required by Title 26 of the Louisiana Revised Statutes. The Hotel collects sales tax on transactions in the Grill as an agent of the State of Louisiana as provided in Louisiana Revised Statutes, Title 47, Section 306 and receives a rebate on such taxes pursuant to Section 56-43 of the New Orleans City Code."

Paragraph eight concluded:

"All acts alleged in this complaint to have been done or omitted by defendants or their agents were done or omitted under color of law of the State of Louisiana and under color of defendant's position as an agent of the State under Revised Statutes 47:306 and Title 26."

It is apparent that Millenson's state action argument must stand or fall under these allegations.

[5] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965 (1972).

A cursory examination of these state licensing statutes manifestly leads one to the conclusion that they are completely unrelated to the admission policies of the licensees.

The impetus for the grill's admission policies originated with the hotel and not with the state. Justice Rehnquist's observations in *Moose Lodge,* are equally applicable and decisive of Millenson's contentions. Justice Rehnquist stated:

> There is no suggestion in this record that the Pennsylvania Act, either as written or as applied, discriminates against minority groups either in their right to apply for club licenses themselves or in their right to purchase and be served liquor in places of public accommodation.
>
> • • •
>
> However detailed this type of regulation may be, in some particulars it cannot be said to in any way foster or encourage racial discrimination, nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the Club's enterprise.[6]

The judgment of the district court is AFFIRMED.

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[6] Id. at 1972-73.

Order of United States Court of Appeals for the Fifth Circuit Denying Rehearing and Rehearing en Banc Dated May 9, 1973

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3131

DEBRA MILLENSON, On Behalf of Herself and all Others Similarly Situated,

Plaintiff-Appellant,

versus

THE NEW HOTEL MONTELEONE, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 23, 1973, 5 Cir., 1973, —— F.2d ——).

(May 9, 1973)

Before:

GEWIN, COLEMAN and MORGAN,

Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Opinion of the United States District Court for the Eastern District of Louisiana Granting Defendant's Motion for Summary Judgment (excerpted from Transcript of Hearing before the Honorable Jack M. Gordon, August 23, 1972, pp. 22-26)

The Court: All right. I have studied the matter. I have studied your briefs and appreciate your argument. I'm ready to rule. I'm going to grant the summary judgment requested by the defendant dismissing the action for failure to state a cause of action, upon which relief may be granted. My reasons are so simple. I think the law as stated by the Supreme Court in the *Moose Lodge* case is so clear that I'll merely state my reasons orally.

In the first place, we must keep matters in context. We must not confuse the public accommodations provision of the Civil Rights Act of 1964, which all parties here admit is inapplicable, because it does not prohibit discrimination on the basis of sex. Therefore, to the extent that certain cases have been cited, which arose under the Civil Rights Act, public accommodations provisions, the Court must consider them to be inapposite. The plaintiff here contends that the action of the Monteleone Hotel in operating a part of its facility as a men's grill becomes State action because of extensive State regulation. Therefore, two questions must be asked and answered. If the first threshold question, assuming in arguendo that the plaintiff was correct and that State involvement was sufficiently significant so as to make the action of the Monteleone a State action, would this be the type of discrimination prohibited by the equal protection clause of the Fourteenth Amendment? I conclude as a threshold proposition that it would not; that even though the Supreme Court may have said that sexual

discrimination is suspect, it is not referring—has not referred to this type of sexual discrimination, which indeed is, in the factual situation here present, in this Court's opinion greatly stretching the point to even refer to it as discrimination. Indeed, I would leave to the sophist the proposition of stating that the Monteleone is discriminating when it has most all of its facilities, with the exception of the Men's Grill and so far as I know, rest rooms available on a non-discriminatory basis to the sexes. However, it is clear that if it were a State action, it would have to be invidious discrimination. As I stated, I do not consider this discrimination to be invidious. I consider that the operation of a men's grill is something which is within the right. After all, private property owners still have rights guaranteed under the Constitution. One of those rights is to operate their business in a fashion which does not contravene more important rights of others and to the extent that the Monteleone feels that its opportunity to attract clientele by virtue of the Men's Grill operation, I don't feel that this in any way inhibits the rights of the plaintiff in this case. I think there are copious places both in and around the Monteleone where the plaintiff may fully explore dining with clients and others without in any way being subjected to the type of invidious discrimination, which has been referred to in many cases, in which the area has arisen. Thus, even if this were a State action the Court would not consider it invidious. I don't have to reach that however, because I think under the *Moose Lodge* case it is quite clear that the regulations imposed upon the Monteleone Hotel by the State by virtue of regulatory statutes and licensing statutes is not sufficient involvement. Justice Rehnquist made it clear that the Supreme Court has never held that discrimination by an otherwise private

entity would be violative of the equal protection clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to State regulation in any degree, whatever. Since State furnished services include such necessities of life as electricity, water and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in the Civil Rights cases, supra, and adhered to in subsequent decisions. "Our holdings indicate that where the impetus for the discrimination is private, the State must have significantly involved itself with invidious discriminations, in order for the discriminatory action to fall within the ambit of the constitutional provisions."

Now, after going into the detail concerning liquor licensing and I think it is well known by anyone schooled in the law that State involvement in liquor is probably the most intense of any involvement going back to the days of the Whiskey Rebellion, governmental regulation of the whiskey industry. Referring to this involvement the Supreme Court said, "However detailed this type of regulation may be in some particulars it cannot be said to in any way foster or encourage racial discrimination." In this case I don't think it can foster or encourage sexual discrimination, nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise. The limited affect goes on to outline the discrimination, which I won't bother by putting in the record, for this is a quotation from Page 4719 of 40 Law Week, where I feel the Supreme Court made it very clear that the type of involvement, such as the State has in regulation of the Monteleone Hotel does not constitute and make it a State action. Thus for the reason stated, the Court will grant the motion for summary judgment and dismiss the action.

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OCTOBER TERM, 1973

NO. 73-109

DEBRA MILLENSON, on behalf of herself and all others similarly situated,

Petitioner

-v-

THE NEW HOTEL MONTELEONE, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-109

DEBRA MILLENSON, on behalf of herself and all others similarly situated,

Petitioner,

-v-

THE NEW HOTEL MONTELEONE, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The respondent, The New Hotel Monteleone, Inc., respectfully prays that this Court deny petitioner's request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 23, 1973, rehearing denied, May 9, 1973.

QUESTIONS PRESENTED

I. Whether it is a denial of the Equal

Protection Clause of the Fourteenth Amendment for a private corporation to reserve certain accommodations to men only, while making available to both sexes the same type of accommodation.

II. Whether the State of Louisiana, through its Liquor License Law and other regulatory devices, being however neutral with respect to such arrangement of accommodations, is sufficient State involvement to constitute State action.

REASONS FOR NOT GRANTING THE WRIT

I. RESPONDENT HOTEL HAS CHOSEN TO RESTRICT SEATING TO MEN ONLY IN ONE OF ITS NUMEROUS DINING FACILITIES WHICH POLICY IS NOT IN ANY FASHION RELATED TO ANY STATE LAW, ORDINANCE, REGULATION OR ACTIVITY.

The question presented here for review is whether or not the State is the impetus for the distinction established by Respondent, The New Hotel Monteleone, Inc., in restricting sitting to men only in but one of its several luncheon facilities. The Trial Court found that the State was not so involved and dismissed Petitioner's complaint for injunctive relief.

> ". . . that the regulations imposed upon the Monteleone Hotel by the State by virtue of regulatory statutes and licensing statutes is not sufficient involvement." (Appendix, Petition for Writ of Certiorari, page 22.)

The Fifth Circuit Court of Appeals in affirming the decision below held that:

". . . Cursory examination of the state licensing statutes manifestly leads one to the conclusion that they are completely unrelated to the admission policies of the licensees.

The impetus for the Grill's admission policies originated with the hotel and not with the state. Justice Rehnquist's observations in Moose Lodge are equally applicable and decisive of Millenson's contentions . . ." (Appendix, Petition for Writ of Certiorari at page 18.)

The complaint filed in the lower Court alleged that the Petitioner, solely on the basis of sex, was denied seating in the Men's Grill operated by The New Hotel Monteleone, Inc. This denial of seating was further alleged to have effectively denied to Petitioner rights secured by the Equal Protection Clause of the Constitution of the United States.

This action does not arise from any refusal on the part of the Hotel to serve female patrons, but from the Hotel's decision to reserve a certain area of its luncheon facilities for male patrons only, while offering to both men and women the same food and service in other areas of the Hotel. Thus, the Hotel has not chosen to exclude women altogether from its facilities as was the situation arising in Bennet and Seidenberg, infra.

None of the applicable regulatory statutes* authorize or prohibit the alleged discrimination. They deal with matters completely distinct, separate and apart from the alleged discrimination. The mere showing of State involvement with private persons does not establish that private person as an actor under color of law, sufficient to maintain an action under the Fourteenth Amendment.

> "It cannot be disputed that under our decisions private conduct abridging individual rights does no violence to the equal protection clause, unless some significant extent, the State in any of its many manifestations has been found to become involved." Peterson vs The City of Greenville, South Carolina, 82 S. Ct. 1119, 373 U.S. (1963).

For similar results see Adickes vs S. H. Kress & Co. 90 S.Ct. 1598, 398 U. S. 144 (1970); Shelley vs Kraemer, 334 U.S. 1, 68 S. Ct. 836, 93 L. Ed. 1161 (1948); and Moose Lodge No. 107 vs Irvis, 407 U.S. 163, 92 S. Ct. 1965 (1972).

There is not presented here any manifestation of State activity, or State intrusion, which is the absolute prerequisite to establish a claim for relief. There is no State law compelling or forbidding any

*Title 26 of the Louisiana Revised Statutes re The Issuance of Liquor Licenses, Section 56-43 of the New Orleans City Code and Title 47, Section 306 of the Louisiana Revised Statutes re The Collection and Rebate of State Sales Taxes.

Louisiana hotel to segregate part of its restaurant facilities so as to provide service to men only.

The Court below, in dismissing Petitioner's complaint primarily relied on the following language of this Court in Moose Lodge No. 107 vs Irvis, supra.

> "Our holdings indicate that whether the impetus for the discrimination is private, the State must have significantly involved itself with invidious discriminations, Reitman vs Mulkey, 387 U.S. 369, 380 (1967), in order for that discriminatory action to fall within the ambit of the constitutional prohibition."

The Court then went on to say that:

> "...there is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended,either overtly or coverly to encourage discrimination." (At p. 1972)

Justice Rehnquist, as organ of the Court, emphatically and unequivocably decimates Petitioner's argument that the extensive State regulation of the Petitioner's business activities is alone sufficient to bring the conduct complained of under the prohibitions established by the Fourteenth Amendment of the Constitution.

> "However detailed this type of regulation may be, in some particulars it cannot be said to any way forster or encouraged racial discrimination, nor can it be said to make the State

> in any realistic sense a partner or even a joint venturer in the Club's enterprise." (Moose Lodge at p. 1973)

The conclusion reached by the Court in Moose Lodge, supra, is squarely on point in its application to the instant controversy, to-wit:

> "We therefore hold, with the exception hereinafter noted, the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge, so as to make the latter 'State action' within the ambit of the Equal Protection Clause, Fourteenth Amendment." (At p. 1973)

The exception above referred to deals only with a provision of the licensing board which required that each licensed club shall adhere to all of the provisions of its constitution and by-laws. This exemption is of no moment here.

There are two distinctions between the case at bar and Moose Lodge. The first is that whereas in Moose Lodge, Irvis was denied service altogether, in the case at bar, the Respondent offered to Petitioner service in the general dining room, which strengthens the position of Respondent herein. The other is that in Moose Lodge the facility in question was classified as a private club. The distinction is of no significance because both, the Monteleone Hotel and the Moose Lodge operated under State liquor licenses and Moose Lodge was not decided on the issue

of private club vs public restaurant, but on the issue of State involvement through the granting of a liquor license.

Respondent's reliance upon Bennett vs Dyer's Chop House, 350 F. Supp. 153 (N.D. Ohio, 1972) Seidenberg vs McSorley's Old Ale House, 308 F. Supp. 1253 (S.D.N.Y. 1969) and Burton vs Willmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed 45, is misplaced.

Seidenberg and Bennett, supra, are incompatible with the pronouncement of the Court in Moose Lodge, supra, for the reason that the Court in Moose Lodge clearly held that the mere operation of a business under authority of a State issued liquor license is not a significant State activity so as to bring the license within the preview and the prohibitions established by the Fourteenth Amendment.

Women have never been excluded from Respondent's hotel as was the situation in the Bennett and Seidenberg. The Hotel has only reserved seating in certain areas of its luncheon facilities for men, while offering to both men and women the same service in other areas of the Hotel.

In Burton, supra, the controlling question was whether a restaurant, operating as an integral part of a building, constructed with public funds and maintained by public funds, upon property purchased with public funds, became a significant manifestation of the State so as to bring into play the prohibitions of the Fourteenth Amendment. Those were the facts upon which the Supreme Court based its decision.

The only similarity between Burton and these proceedings is that both deal with a restaurant operation. No other factual similarity exists.

Application of the Civil Rights Act of 1964, 42 U.S.C.A., Sec. 2000 (A) which Section is more commonly referred to as the accommodations section, is unwarranted here because said provision specifically excludes sexual discrimination as re-dressable thereunder. No guarantee has been made with reference to sex under the provisions of the accommodation section. Seidenberg, supra, DeCrow vs Hotel Syracuse, Inc. 288 F. Supp. 530.

Moose Lodge, together with the following authorities, lead to the inescapable conclusion that the petition must be dismissed for lack of requisite state action involved in the distinction drawn by the New Hotel Monteleone.

> "The equal protection clause was designated as a safeguard against acts of the state, and not against the conduct of private individuals or persons. It does not add anything to the rights which one citizen has against another under the Constitution. Private conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the state in any of its manifestations has been found to have become involved in it." American Jurisprudence 2d, Volume 16, p. 856, verbo Constitutional Law.

The Court in Adickes, supra, said at

page 1611 that:

> "On the other hand Section 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections. As was said in Shelley vs Kraemer, supra, Section 1 of 'that Amendment erects no shield against merely private conduct, however discriminatory or wrongful'." 334 U.S., at 13, 68 S. Ct., at 842.

There is herein no State impetus or involvement, rather, the impetus for the distinction in the lounge seating arrangements drawn by Respondent is based upon its desire to remain competitive and increase its business volume. Historically, any restrictions on an individual's right to pursue a private interest has been and must be cautiously and narrowly applied. Recognizing that private conduct may be reasonably controlled by law and Statute, conclusions must be made as to the dividing line where business decisions are to be constrained by constitutional limitations. This Court has drawn that line in Moose Lodge and the instant controversy clearly falls within those guidelines. A decision to the contrary will destroy that dividing line and deny Respondent the right to pursue corporate decisions and policies, not in any way influenced by any intent to discriminate, but solely by economic considerations.

CONCLUSION

WHEREFORE, the premises considered, respondent, The New Hotel Monteleone, Inc., prays that the Court deny petitioner's request for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing brief in opposition filed on behalf of respondent, The New Hotel Monteleone, Inc., was served on counsel for petitioner, Ruth Bader Ginsburg, Melvin L. Wulf, and Brenda Feigen Fasteau, American Civil Liberties Union, 22 East 40th Street, New York, New York 10016, by depositing in the United States mails, postage prepaid.

New Orleans, Louisiana, this 11th day of October, 1973.

_____
FRANK C. DUDENHEFER, JR.